



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Case No. 2010-125

Frechon
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Kamaljit Singh Garewal
Judge Jean Courtial

Judgment No.: 2011-UNAT-132

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Antonio Bautista/Hugh McCairley

Counsel for Appellant/Respondent: Phyllis Hwang

7. In July 2003, Frechon began developing paresthesias and numbness in the two “ulnar” fingers of her left hand. She was diagnosed with left ulnar nerve damage at the elbow level (cubital tunnel syndrome) and her injury was later determined as mostly service-related.² Following a surgery in Spain, Frechon resumed work at the ICTR on 27 January 2004. However, despite electrotherapy, massages, and the use of painkillers, the pain and paresthesias recurred. Frechon was placed on extended sick leave from the end of November 2004 and remained on sick and/or annual leave until her separation on 31 July 2007.

8. For the purpose of determining her fitness to return to work, Frechon underwent two medical evaluations, one in Geneva in November 2005 and the other in New York in May 2006. The Geneva evaluation concluded that Frechon was not fit to return to work and that, if she were to return to Arusha in the future, accommodations would have to be made as part of her working arrangements. The New York evaluation, on the other hand, concluded that Frechon was able to perform at the sedentary level of work for an eight-hour day but that, given her decreased fingering and handling ability, it was unlikely that she could perform the sedentary level if it required working with a computer workstation.

9. On 2 November 2006, the ICTR informed the United Nations Headquarters that arrangements (provision of a dictaphone, a dedicated typist and the Dragon Naturally Speaking voice-recognition software) had been made to enable Frechon to resume her duties as translator without having to use a keyboard. The United Nations Medical Service Division (MSD) thereafter declared that Frechon was fit to return to work in Arusha. Frechon, however, disagreed with that decision and requested the convening of a Medical Board.

10. A three-member Medical Board was constituted to examine Frechon and to determine whether she was fit to work as a translator through the use of appropriate work accommodations. To this question the Medical Board replied in its report of 11 April 2007 that

² For that service-related injury, Frechon was awarded inter alia monetary compensation in the amount of USD 35,167.20, which was equivalent to 15 per cent permanent loss of the function of the whole person, under Appendix D of the Staff Rules.

31 July 2007 in light of the conclusion by the Medical Board that she was not able to resume her professional activities with the ICTR in Arusha due to the fact that there was no appropriate medical treatment within a reasonable distance of Arusha.

14. Frechon appealed the decision but she did not prevail during either the administrative review phase or in front of the Joint Appeals Board (JAB). On 13 May 2009, the Deputy Secretary-General informed Frechon of the JAB's findings and the decision of the Secretary-General not to renew her contract in light of the JAB's findings.

15. On 18 September 2009, Frechon filed an application with the Dispute Tribunal challenging the decision not to renew her fixed-term appointment beyond 31 July 2007. On 30 October 2009, the Secretary-General filed an answer, which consisted of his previous submissions to the JAB as well as the JAB report.

16. In Judgment No. UNDT/2010/089 dated 7 May 2010, Judge Izuako found that, contrary to the assertion by the Secretary-General, Frechon's fixed-term appointment "was allowed to run until the end of the term and was not renewed on medical grounds", her contract "came to an end as a result of her service-incurred injury... Rather than abide by the Organization's procedure for dealing with staff members who find themselves in such a predicament, the Respondent opted to 'allow' [Frechon's] fixed-term appointment to run out to avoid his legal obligations". In her view, Frechon's separation was "initiated by the Secretary-General" due to her inability to resume her professional activities as a result of her service-incurred injury, and was thus "in fact terminated" entitling her to the procedures set forth in administrative instruction ST/AI/1996/16 "Termination of appointment for reasons of health" issued on 28 December 1999. Moreover, the contested decision "was informed by improper motive".

17. Judge Izuako criticised the Administration for its failure to comply with the procedures set forth in ST/AI/1999/16, including initiating a request to the United Nations Staff Pension Committee (UNSPC) for a determination as to whether Frechon should be awarded a disability benefit, and granting Frechon special leave with half pay for the period from 28 March 2007 through 31 July 2007.

18. Judge Izuako remanded the case to the Administration for concurrence on the implementation of the correct procedure required under ST/AI/1999/16. She also

ordered the Secretary-General to pay Fréchet compensation equivalent to three months' net base salary for the delay in complying with the ST/AI/1999/16 procedures.

19.

33. Considerations of health obviously played a part or were a decisive factor in the decision not to renew Frechon's appointment. Consequently, the provisions of Staff Regulations on termination and disability benefits are applicable.

34. Frechon, as a result of her service-incurred injury, is not able to resume her normal professional activity in Arusha nor anywhere else in the world. Her separation from service, ostensibly on the expiration of her fixed-term appointment, was effectively initiated by the Secretary-General for reasons of health and is indeed a termination.

35. The Secretary-General's contention regarding the applicability of ST/AI/1999/16 given that the administrative instruction is silent on the right of a staff member to challenge a decision that he or she should not be considered for a disability benefit, is specious and incorrect. Since ST/AI/1999/16 was promulgated in conjunction with Article 33 of the UNJSPF Regulations, which allows for challenges to a decision that a staff member should not be considered for a disability benefit, it logically follows that the provisions and entitlements under ST/AI/1999/16 are applicable when invoked by a staff member who is not considered for a disability benefit.

36. The establishment of a Medical Board and the fact that the Medical Board sustained Frechon's contentions made Frechon eligible for special leave with half pay.

37. Frechon has not been awarded more than two years' compensation. Lost earnings represent a form of compensation, but are not to be included as compensation for purposes of Article 10(5) of the UNDT Statute, which refers exclusively to compensation in lieu of rescission or specific performance.

38. The question of the appropriate rate of interest is a matter for the Dispute Tribunal to decide in light of the circumstances of the particular case. The Secretary-General has failed to present any argument as to why the interest rate awarded is inappropriate and therefore it should be allowed to stand.

Considerations

39. In the present case, the Secretary-General's principal contentions are that the Dispute Tribunal erred on a question of law in concluding that the non-renewal of Frechon's fixed-term appointment constituted a "termination" within the meaning of

former Staff Rule 109.1(b), and that the Dispute Tribunal erred in law in its determination that the procedure set out in ST/AI/1999/16 “Administrative Instruction – Termination of appointment for reasons of health” was applicable to Frechon’s case.

40. The Secretary-General further contends that the Dispute Tribunal erred in law and fact, and exceeded its jurisdiction in concluding that the administrative decision not to renew Frechon’s appointment was “informed by *impr oper motive*”.

41. Former Staff Rule 109.1(b) defines “termination” as “...a separation from service initiated by the Secretary-General, other than retirement at the age of sixty years or more or summary dismissal for serious misconduct”.

42. Former Staff Rule 109.7 on “Expiration of fixed-term appointments” provides as follows:

(a) A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

(b) Separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules.

43. The Secretary-General invokes a wealth of jurisprudence from the former Administrative Tribunal in which the issue of the non-renewal of fixed-term appointments has been addressed. The former Administrative Tribunal consistently affirmed that such appointments carry no expectation of renewal. The Secretary-General also cites the more recent jurisprudence of this Tribunal in *Balestrieri* and *Syed*,³ which affirmed the principle that fixed-term appointments, as defined in the relevant Staff Regulations and Rules, carry no expectation of renewal.

44. However, the jurisprudence of both the former Administrative Tribunal and this Tribunal have established that an administrative decision not to renew a fixed-term contract may be challenged in certain circumstances, for example where the actions of

will arise if the administrative decision not to renew is based on improper motives or if there are countervailing circumstances.

45. It is in the context of these established case law principles that the findings of the Dispute Tribunal in the present case, on the issue of the expiry of a fixed-term contract versus the termination of an appointment, as defined in the relevant Staff Regulations and Rules, must be assessed.

46. In the course of its Judgment No. UNDT/2010/089 of 7 May 2010, the Dispute Tribunal stated inter alia:

It is the Respondent's argument that since the Applicant's fixed-appointment "was allowed to run until the end of the term and was not renewed on medical grounds," [...]the present situation does not amount to a termination of contract but instead falls under the ambit of former Staff Rule 109.7 and hence the Applicant does not have any legal right to compensation under Chapter IX and Annex III of the Staff Rules. The Tribunal is not convinced by this argument. Having considered all the evidence before it, the Tribunal is of the opinion that the Applicant's fixed term-appointment came to an end as a result of her service-incurred injury. Apart from the said injury, there is nothing before the Tribunal to show that the Applicant's fixed-term appointment would not have been renewed beyond its expiration date. Rather than abide by the Organization's procedures for dealing with staff members who find themselves in such a predicament, the Respondent opted to "allow" the Applicant's fixed-term appointment to run out to avoid his legal obligations.

47. In the course of its Judgment No. UNDT/2010/124 of 14 July 2011, the Dispute Tribunal reprised the findings it made in Judgment No. UNDT/2010/089 in the following terms:

- (i) The Applicant's fixed term appointment came to an end as a result of her service-incurred injury.
- (ii) The Applicant's fixed term appointment was in fact improperly terminated and it was disingenuous for the Respondent to argue that "it was allowed to run until the end of the term and was not renewed on medical grounds."
- (iii) The administrative decision not to renew the Applicant's fixed-term appointment due to the Applicant's inability to resume her professional activities with ICTR in Arusha was informed by improper motive.
- (iv) The applicable procedural rules that should have been followed by the Respondent in this case contained in ST/AI/1999/16 were not complied with.
- (v) The Applicant was entitled to be placed on special leave with half pay for the period from 28 March 2007 to 31 July 2007.

in the locality. The use of a computer keyboard has become impossible, as mentioned in all the reports we were able to review.”

53. The Dispute Tribunal’s interpretation of that conclusion was that Frechon was incapable of further service, as defined by section 1 of ST/AI/1999/16.

54. We find nothing in the submissions of the Secretary-General to convince us that this finding was erroneous in law or in fact, or beyond the competence of the Dispute Tribunal, with regard to the facts as they were before that Tribunal. We are satisfied that the Dispute Tribunal’s conclusion was not tantamount to it having stepped into the shoes of the United Nations Medical Director.

55. It is beyond question that the Secretary-General himself, when informing Frechon that her contract was not being renewed, advised her that this was because of her inability to resume her professional activities with the ICTR in Arusha. Thus, her

Judgment

60. We therefore, in all the circumstances, find that the Dispute Tribunal was correct in rescinding the decision made to terminate Frechon's employment.

61. We uphold the Order reinstating Frechon, but hereby vary the Orders made under 5.2(i) and (ii) in the Dispute Tribunal Judgment to an Order reinstating Frechon for the purpose of the Administration initiating the procedures pursuant to ST/AI/1999/16. Given the Dispute Tribunal's finding that Frechon was incapable of working for reasons of health, we find no basis for the Order in paragraph 5.2(ii). Such entitlements as may accrue to Frechon will be determined under ST/AI/1999/16.

62. We affirm the Order in paragraph 5.2(iii).

63. We uphold the Order in paragraph 5.2(iv) save that the interest payable on such compensation is to be calculated on the basis of the Appeals Tribunal's decision in *Warren*.⁵

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar

⁵ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.